Filed 2/1/05 P. v. Bochicchio CA2/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. BILL BOCHICCHIO, Defendant and Appellant.	B171068 (Los Angeles County Super. Ct. No. YA053104)

APPEAL from a judgment of the Superior Court of Los Angeles County, Andrew C. Kauffman, Judge. Affirmed in part, reversed in part, vacated in part, and remanded with directions.

C. Elliot Kessler, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, William T. Harter, Supervising Deputy Attorney General, and Lawrence M. Daniels and Myung J. Park, Deputy Attorneys General, for Plaintiff and Respondent.

Bill Bochicchio appeals from the judgment entered following his conviction by jury of first degree residential burglary (Pen. Code, § 459), with court findings that he suffered a prior felony conviction (Pen. Code, § 667, subd. (d)), and a prior serious felony conviction (Pen. Code, § 667, subd. (a)), following the denial of a suppression motion (Pen. Code, § 1538.5). He was sentenced to prison for 17 years.

In this case, we hold (1) appellant was not denied effective assistance of counsel by his trial counsel's failure to assert double jeopardy as a bar to retrial, (2) the court reversibly erred by denying appellant's suppression motion, (3) there was sufficient evidence that appellant committed burglary, and (4) remand for resentencing is required because the trial court erroneously believed that its imposition of consecutive sentences for the present case, and a probation case, was mandatory under the Three Strikes law.

FACTUAL SUMMARY

1. *People's Evidence.*

Viewed in accordance with the usual rules on appeal (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established that on May 29, 2002, Autumn Harding and Amy Price lived in a house on Palm Drive in Hermosa Beach. Harding and Price left for work that morning. Harding left at 8:30 a.m. and kept her bedroom door open. Harding was the last to leave and, before she left, she secured the residence and closed the front window, which could not be locked.

About 12:15 p.m., Price returned home for lunch. While there, Price noticed that Harding's bedroom door was closed, and the front window was open. Price thought it was unusual that the front window was open, since it was normally closed. About 1:00 p.m., Price finished lunch, closed the front window, and left the house. Sometime after 8:30 a.m., when Harding left that morning for work, but before about 5:30 p.m., when Price returned home from work, the house was burglarized.

About 5:30 p.m., Price returned from work and noticed that Harding's bedroom door was open. About 8:00 p.m., Harding returned from work. After Harding returned, she noticed that her bedroom alarm clock was missing, as well as jewelry which she kept in her closet. The jewelry included a bracelet, gold necklace, and five rings. Other

belongings were missing, including a compact disc player, two cameras, a tool kit, and a gym bag. Harding saw someone's glasses in the middle of the floor of her bedroom closet. Price noticed that Price's diamond tennis bracelet, a gold bracelet, a watch, and a carton of cigarettes were missing. About 9:00 p.m., Price reported the incident to police.

About 2:45 p.m., Hermosa Beach Police Detective Brian Smyth was conducting surveillance of the southwest area of Hermosa Beach when he saw appellant riding a bicycle southbound on Palm Drive. Appellant was about five blocks from the house of Harding and Price. He was carrying a duffle bag over his shoulder and had a large black plastic case. Appellant turned onto First Court, a residential area where a house was being built. He rode past the house, looked up, turned around, and returned to the house. Appellant put the duffle bag on the bicycle's handlebars, then took the black case with him as he entered the house and went upstairs. Four men were working on the top floor.

When a uniformed officer arrived, appellant, on the top floor of the house, looked down over a railing at Smyth and the uniformed officer. Smyth motioned to appellant to come down. Appellant complied but did not bring the black case. The uniformed officer went in the house and recovered the black case from upstairs.

Hermosa Beach Police Detective Raul Saldana found a screwdriver in appellant's left rear pants pocket. Saldana testified that a screwdriver was frequently used as a burglary tool to enter a residence. Saldana found several items of jewelry in appellant's right front pants pocket. The duffle bag contained an alarm clock, compact disc player, two cameras, and a carton of cigarettes. The black case was an emergency roadside kit with gloves inside. Police returned to Harding and Price all of the property that had been taken from their house.

2. *Defense and Rebuttal Evidence.*

Appellant presented an alibi defense through his aunt, Jean Buccinio, who testified as follows. Buccinio lived with appellant in her home on Anita Street in Redondo Beach. At 8:00 a.m. on May 29, 2002, Buccinio saw appellant sleeping in the house. About 9:00 a.m., he got up, and later worked in the backyard. After that, around noon, appellant began putting new rollers on sliding glass doors. Appellant took the doors off and began

working on them with a screwdriver. Appellant noticed the rollers were not the right ones. About 1:30 p.m., appellant took his bicycle and left to go to a hardware store to buy new rollers. Buccinio saw appellant put the screwdriver in his pocket before he left.

In rebuttal, Hermosa Beach Police Detective Steve Endom testified that on May 29, 2002, he contacted Buccinio at her residence and, when he asked her if she knew where appellant was, she replied in the negative. Endom did not ask Buccinio where appellant had been earlier that day. Palm Avenue was not part of the direct route from appellant's residence to the hardware store closest to his residence.

CONTENTIONS

Appellant contends: (1) "Trial counsel rendered ineffective assistance of counsel in failing to move to preclude retrial of the burglary count on double jeopardy grounds," (2) "The trial court erred in denying appellant's motion to suppress evidence by improperly shifting to appellant the burden of proof and erroneously holding that appellant had no standing," (3) "The judgment must be reversed because the evidence of burglary was insufficient," (4) "The trial court erred in failing to exercise discretion in imposing sentence for the probation violation as a consecutive sentence," and (5) "Appellant was deprived of his constitutional rights to a jury trial and due process because the trial court imposed the upper term without a jury finding beyond a reasonable doubt as to the existence of the facts used to impose the upper term."

DISCUSSION

1. *Appellant Was Not Denied Effective Assistance of Counsel by His Trial Counsel's Failure to Assert Double Jeopardy as a Bar to Retrial.*

a. *Pertinent Facts.*

The information alleged, inter alia, that appellant committed first degree residential burglary (Pen. Code, § 459; count one) and receiving stolen property (Pen. Code, § 496; count two). On April 4, 2003, the jury and an alternate juror were impaneled and affirmed to try the cause. On April 9, 2003, the jury retired to deliberate.

The jury deliberated about four hours until, at 2:54 p.m., the jury discussed with the court what they should do if there were a reasonable interpretation pointing to

innocence, a reasonable interpretation pointing to guilt, but one interpretation was more reasonable than the other. The court reiterated that, pursuant to CALJIC No. 2.01, if there were two reasonable interpretations, the jury had to acquit appellant. At 2:56 p.m., the jury resumed deliberations.

At 3:12 p.m., the jury returned to the courtroom and the foreperson indicated that the jury had been unable to reach a verdict as to count one, the jury had "reached a verdict" as to count two, but the jury had not signed and dated the verdict form as to count two. The foreperson also indicated that, as to count one, the jury had taken several votes which were eight to four and, once, the vote was nine to three.

During subsequent questioning by the court as to count one, the foreperson indicated that further deliberations would not result in a verdict. The court asked the jury to return to the jury room, complete the verdict form as to count two, "then let us know when you come back out and render your verdict[.]" At 3:15 p.m., the jury returned to the jury room.

An unreported bench conference subsequently occurred between the court and counsel. The following then occurred: "The Court: Prior to the jury rendering its verdict, Mr. [Prosecutor], do you have a motion? [¶] [The Prosecutor]: We're moving to dismiss count 2, the receiving stolen property. [¶] [Defense Counsel]: Submit it. [¶] The Court: Motion to dismiss is granted."

At 3:19 p.m., the jury returned to the courtroom. The court told the jury that count two had been dismissed. The court questioned the foreperson and jury further as to count one, and the foreperson and jury indicated there was no reasonable likelihood that the jury could render a verdict as to that count. The court concluded the jury was hopelessly deadlocked as to count one and declared a mistrial as to that count. The jury was discharged and the foreperson stated that, as to count one, the vote had been eight to four for guilt. Count one was retried, resulting in appellant's present burglary conviction.

b. *Analysis.*

Appellant claims (1) the jury rendered a guilty verdict as to count *two* when, before the jury completed the verdict form as to that count, the jury told the court that

they had reached a verdict as to that count, (2) once said guilty verdict was rendered as to count two, double jeopardy and Penal Code section 1203, barred the retrial on count *one*, and (3) appellant's counsel's failure to raise the double jeopardy issue below constituted ineffective assistance of counsel. We disagree.

"The Fifth Amendment to the federal Constitution provides: 'No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb . . . .' The double jeopardy clause protects criminal defendants in three ways: '"It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense."' [Citations.]" (*People v. Massie* (1998) 19 Cal.4th 550, 563.) "Protection against double jeopardy is also embodied in article I, section 15 of the California Constitution, which declares that '[p]ersons may not twice be put in jeopardy for the same offense.'" (*People v. Fields* (1996) 13 Cal.4th 289, 297-298.) Penal Code section 1023, "implements the protections of the state constitutional prohibition against double jeopardy, and, more specifically, the doctrine of included offenses." (*People v. Fields, supra*, 13 Cal.4th at p. 305-306.)

Penal Code section 1023, states, "When the defendant is convicted or acquitted or has been once placed in jeopardy upon an accusatory pleading, the conviction, acquittal, or jeopardy is a bar to another prosecution for the offense charged in such accusatory pleading, or for an attempt to commit the same, or for an offense necessarily included therein, of which he might have been convicted under that accusatory pleading."

"In some circumstances, double jeopardy bars a retrial even though no verdict has been rendered. Once jeopardy has attached, discharge of the jury without a verdict is tantamount to an acquittal and prevents a retrial, unless the defendant consented to the discharge or legal necessity required it. [Citations.] [Fn. omitted.] 'Such a legal necessity exists if, at the conclusion of such time as the court deems proper, it satisfactorily appears to the court that there is no reasonable probability that the jury can resolve its difference and render a verdict. Under these circumstances the court may properly discharge the jury and reset for trial.' [Citations.]" (*Stone v. Superior Court*

(1982) 31 Cal.3d 503, 516; *People v. Guillen* (1994) 25 Cal.App.4th 756, 761 [accord].)

There is no dispute that jeopardy initially attached as to counts one and two once the jury and alternate juror were impaneled and affirmed to try the cause. The issue is whether jeopardy subsequently terminated as to count one with the result that appellant's retrial on that count violated double jeopardy principles.

First, we reject appellant's claim that the jury rendered a verdict, much less convicted him, on count two. The in-court oral declaration of the jurors is the true return of the verdict. (*People v. Lankford* (1976) 55 Cal.App.3d 203, 211, *People v. Mestas* (1967) 253 Cal.App.2d 780, 786.) Penal Code section 1149, states, "When the jury appear they must be asked by the Court, or Clerk, whether they have agreed upon their verdict, and if the foreman answers in the affirmative, they must, on being required, declare the same." Certainly, the foreperson, when indicating to the court merely that the jury had "reached a verdict" as to count two, did not expressly or orally declare that the verdict was guilty. Even assuming an express declaration was not required but only a clear indication of the jury's intent to convict (*People v. Webster* (1991) 54 Cal.3d 411, 447; *Bigelow v. Superior Court* (1989) 208 Cal.App.3d 1127, 1134; Pen. Code, § 1162), the jury gave no such indication.

Indeed, if anything, the speed with which, after the court explained CALJIC No. 2.01, the jury announced it was hung as to count one and had reached a verdict as to count two indicates they were prepared to acquit, not convict, on count two. Presumably the prosecutor would not have moved to dismiss count two otherwise.

In any event, respondent concedes that once the court granted the prosecutor's motion to dismiss count two, double jeopardy barred a retrial on that count. However, even if, as claimed by appellant, the foreperson's mere announcement that the jury had reached a verdict as to count two constituted a conviction on that count that barred, under double jeopardy principles, a retrial for the "same offense," or even if the court's granting of the motion to dismiss count two barred a retrial for the "same offense," we would still reject appellant's claim that a retrial on count *one* was barred.

"The double jeopardy clause prohibits an individual from being tried twice for the same offense or any included offense. . . . The test is whether each offense contains an element the other does not. (*United States v. Dixon* (1993) 509 U.S. 688, 696-697 . . . [125 L.Ed.2d 556].)" (*People v. Kelley* (1997) 52 Cal.App.4th 568, 576; see *People v. Scott* (1997) 15 Cal.4th 1188, 1201; *People v. Cain* (1995) 10 Cal.4th 1, 71-72.) If each offense contains an element that the other does not, the offenses are distinct and the constitutional prohibition against double jeopardy is not violated. (*People v. Kelley*, *supra*, 52 Cal.App.4th at p. 576.)

Appellant concedes that receiving stolen property is not a lesser included offense of burglary. In fact, each crime includes elements that the other does not. Penal Code section 459, provides, in pertinent part, "Every person who *enters* any house, room, apartment, . . . or other *building*, . . . with *intent to commit grand or petit larceny or any felony* is guilty of burglary." (Italics added.) Penal Code section 496, subdivision (a), provides, in relevant part, "(a) Every person who buys or *receives* any property that has been *stolen* or that has been obtained in any manner constituting theft or extortion, *knowing* the property to be so stolen or obtained, or who conceals, sells, withholds, or aids in concealing, selling, or withholding any property from the owner, knowing the property to be so stolen or obtained, shall be punished . . . ." (Italics added.)

There is no dispute that, absent appellant's contention, the trial court, without violating double jeopardy principles, properly scheduled a retrial on count one after the court granted a mistrial as to that count because of the hung jury. Appellant's retrial on count one did not violate double jeopardy principles or Penal Code section 1023. Therefore, appellant was not denied effective assistance of counsel by his trial counsel's failure to raise a double jeopardy issue below. (Cf. *People v. Ledesma* (1987) 43 Cal.3d 171, 215-217.) None of the cases cited by appellant, or his arguments, compel a contrary conclusion.

2. *Appellant's Suppression Motion Was Erroneously Denied.*

a. *Pertinent Facts.*

On March 10, 2003, appellant filed a Penal Code section 1538.5 suppression motion in which he sought suppression of "all evidence and observations seized without a search or arrest warrant." The motion stated appellant sought suppression of all evidence "seized or obtained as a result of a warrantless detention and arrest" of appellant. In its points and authorities, the written motion urged appellant's detention was illegal because Smyth lacked a reasonable suspicion that appellant was involved in criminal activity. The written motion also urged that although, at the time in question, appellant was "on probation with a search-[waiver] condition," that fact did not justify appellant's detention or "the search[.]" The written motion further urged that the detention and search of appellant were arbitrary and capricious. Finally, the written motion urged that appellant's illegal detention and arrest mandated suppression of the evidence seized and appellant's statements to police.

On March 24, 2003, the suppression motion, plus two of appellant's probation violation cases, were called for hearing. The prosecutor stated he had spoken with appellant's counsel and realized appellant was on probation, "so I don't think we will need much beyond that." The court subsequently asked appellant if he were prepared to establish "an expectation of privacy reasonable under the circumstances[.]" Appellant eventually replied in the affirmative but indicated he needed time to do so.

The court later stated, "Well, the Court has the ability to determine the order of proof, and in this case, the Court determines that first order of business would be for Mr. Bochicchio to establish a reasonable expectation of privacy. [¶] As you know, those expectations are personal to the defendant." At appellant's request, the suppression hearing was trailed to the date of trial. The probation violation matters were also trailed.

On April 1, 2003, the court called the suppression matter plus three of appellant's probation violation cases. The court observed that previously it had inquired if appellant were "asserting his privacy interest in the area -- area searched of the items seized [.]" (*Sic.*) Appellant indicated he was ready to establish his expectation of privacy.

Appellant later testified at the hearing as follows. Between 1:30 and 1:45 p.m. on May 29, 2002, appellant left his Redondo Beach residence on his bicycle and went to a hardware store and then to a convenience store. At the convenience store, two men sold him a black duffel bag, which contained a compact disc player, cameras, a carton of cigarettes, and jewelry. They also sold him the roadside kit, which was not then in the duffel bag. Appellant bought all of the items for $100, then headed home.

Appellant was later stopped by a Hermosa Beach police officer. Appellant testified that, at the time of the stop, the jewelry was in his front pocket, and he had "on [him]" the black bag and roadside kit.

During cross-examination, appellant testified it did not occur to him that the items might be stolen. Appellant bought the items to resell them. He previously had been in jail or convicted of crimes. Appellant indicated an awareness of the elements of receiving stolen property, and he had suffered prior convictions for attempted burglary and "possession[.]" Appellant testified that he felt the items that he bought were his and that he owned them.

The following then occurred: "Q . . . Were you on probation at the time? [¶] A Yes, I was. [¶] Q What were you on probation for? [¶] A Attempted burglary. [¶] Q And was there a condition of that probation that you would be subject to search and seizure? [¶] A I believe that's one of the conditions." No evidence was presented that any police officer was aware of any search condition.

Appellant rested and the People presented no evidence. During argument, appellant urged he had a reasonable expectation of privacy. The prosecutor urged that appellant lacked a privacy interest because the property was stolen and appellant likely knew it. The prosecutor then urged his first argument was irrelevant "because [appellant] had search and seizure conditions, and he doesn't have that expectation of privacy. He is carrying this stuff out in the open."

Appellant replied there was no evidence that the property had been stolen, but there was evidence appellant bought the property and had it on him when stopped by police. Appellant's counsel observed that the prosecutor had indicated appellant was "on

probation with a search waiver condition." Appellant urged an adult probationer could not be searched by an officer who was unaware of the probation condition. Appellant reiterated he had established his reasonable expectation of privacy, and would proceed to the undecided issues of "reasonableness and the search."

The court then stated, "[Defense Counsel], I agree there is no evidence at this point that the property in question was, in fact, stolen. However, I have also heard no evidence that would lead me to conclude that despite the fact that [appellant] did have a case in SA044189 that under the circumstances as they presented themselves he had a reasonable expectation of privacy. [*Sic*.] So I find that he has not established that, and the motion to suppress is denied."

b. *Analysis.*

Appellant contends the trial court erroneously denied his suppression motion. We agree. For reasons discussed below, we believe the trial court should have conducted a suppression hearing on the issues of whether appellant was illegally detained and/or searched, and, although the trial court ruled appellant lacked a reasonable expectation of privacy, the trial court so ruled without the benefit of more recent cases, including our Supreme Court's decision in *People v. Sanders* (2003) 31 Cal.4th 318 (*Sanders*), which make clear that appellant did not lack a reasonable expectation of privacy merely because he was subject to a search probation condition.

In *People v. Williams* (1999) 20 Cal.4th 119, our Supreme Court stated, "we hold that when defendants move to suppress evidence, they must set forth the factual and legal bases for the motion, but they satisfy that obligation, at least in the first instance, by making a prima facie showing that the police acted without a warrant. *The prosecution then has the burden of proving some justification for the warrantless search or seizure*, after which, defendants can respond by pointing out any inadequacies in that justification. [Citation.]" (*People v. Williams, supra*, 20 Cal.4th at p. 136, italics added.)

There is no dispute that appellant's written motion adequately raised the issues that his detention was illegal because it was not based on a reasonable suspicion that he was involved in criminal activity, and an illegal search occurred. At that point, the

burden shifted to the People to justify the detention and search. (*People v. Williams, supra*, 20 Cal.4th at p. 136.) We conclude the trial court erred by not conducting a hearing to determine whether appellant was illegally detained and/or searched.

The trial court was apparently impacted by the prosecution's argument that appellant had a search condition. Fairly read, the trial court's ruling reasonably could have meant only that appellant's admitted search probation condition negated any expectation of privacy he otherwise might have demonstrated. Accordingly, the issue is whether appellant lacked a reasonable expectation of privacy merely because he was subject to a search condition.

Prior to the trial court's 2002 ruling, our Supreme Court, in 1994, had stated, "We conclude a *juvenile* probationer subject to a valid search condition does not have a *reasonable* expectation of privacy over his or her person or property." (*In re Tyrell J.* (1994) 8 Cal.4th 68, 86, first italics added, second italics in original.) Accordingly, *Tyrell J.* concluded that the search of the juvenile in that case was lawful even though the searching officer was unaware of the search condition.

However, in 2003, our Supreme Court held in *Sanders* that "an otherwise unlawful search of the residence of an *adult* parolee may not be justified by the circumstance that the suspect was subject to a search condition of which the law enforcement officers were unaware when the search was conducted. [Fn. omitted.]" (*Sanders, supra*, 31 Cal.4th at p. 335, italics added.) Our Supreme Court in *Sanders* acknowledged that *Tyrell J.'s* holding received a "chilly reception" among prominent commentators. (*Sanders*, 31 Cal.4th at p. 328.) *Sanders* acknowledged that in the previous decision of *People v. Robles* (2000) 23 Cal.4th 789, our Supreme Court "limited" *Tyrell J.*'s holding. (*Sanders*, *supra*, 31 Cal.4th at p. 329.) Moreover, *Sanders*, which involved adult defendants, stated, "Because this case does not involve a juvenile, we need not, and do not, decide" whether *Tyrell J.*'s holding is correct. (*Sanders*, 31 Cal.4th at p. 335, fn. 5.)

Although *Sanders* involved adult *parolees*, subsequent appellate cases have criticized *Tyrell J.*'s holding, and have applied *Sanders*'*s* holding to adult *probationers*. (*Myers v. Superior Court* (2004) 124 Cal.App.4th 1247, 1251-1256; *People v.*

Hoeninghaus (2004) 120 Cal.App.4th 1180, 1184; *People v. Bowers* (2004) 117 Cal.App.4th 1261, 1268-1271.) Indeed, the appellate court in *Bowers* did so after our Supreme Court (1) granted review of the appellate court's previous decision relying on the reasoning of *Tyrell J.*, and (2) ordered the appellate court to vacate its decision and reconsider it in light of *Sanders*. (*People v. Bowers, supra*, 117 Cal.App.4th at pp. 1263-1264.) Accordingly, we decline to apply *Tyrell J.*'s holding, that a juvenile probationer subject to a search condition lacked a reasonable expectation of privacy, to the present case involving an adult probationer.

Respondent, in a rather convoluted argument, urges the trial court's "inquiry into standing" was proper because it revealed that appellant had "waived his Fourth Amendment rights." Respondent concedes that, in light of *Sanders*, neither the detention nor search of appellant was "justified on probation grounds" because no evidence was presented at the hearing in the instant case that any officer was aware of appellant's search condition.

However, according to respondent, "the question remains whether the search can be *justified* on some other basis. And, here, the *justification* comes from appellant's voluntary acceptance of the search condition in exchange for his probation, and consequently waiving his right to object to either the search or seizure of his person." (Italics added.)

Respondent notes that a person can validly *consent in advance* to warrantless searches and seizures in exchange for the opportunity to avoid serving a state prison term. (*People v. Bravo* (1987) 43 Cal.3d 600, 608.) Respondent also notes that a probationer's acceptance of a search condition constitutes "a complete waiver of [the] probationer's Fourth Amendment rights[]" (*People v. Bravo, supra,* 43 Cal.3d 600, 607), except for searches which are (1) unrelated to the rehabilitative purposes of probation or other legitimate law enforcement purposes, or (2) harassing, arbitrary, or capricious. Respondent asserts there was no evidence that the above exception applied, therefore, respondent urges "appellant's agreement to the conditions of his probation effectively waived his challenge to the detention or search on Fourth Amendment grounds[,]

[t]herefore, the court's inquiry into standing was sufficient[]" and the suppression motion was properly denied.

We reject respondent's argument. We agree with appellant that respondent's argument boils down to the proposition that the detention and search of appellant cannot be justified on probation grounds, but can be justified on the ground that appellant waived his right to object to an illegal detention and search. Respondent's argument would overrule sub silentio *Sanders* and similar decisions of our Supreme Court. (See *People v. Robles* (2000) 23 Cal.4th 789, 792 [search and seizure of defendant's garage could not be justified by search probation condition of adult brother who lived with defendant, when police were unaware of the search condition].)

We will remand the matter to permit the trial court to conduct a new suppression hearing on the issues raised by appellant's previously filed suppression motion, as reflected in the first paragraph of part 2.a., *ante*, including the issues of whether appellant was detained and/or searched, and whether any such detention and/or search was illegal, but not the issue of whether appellant lacked a reasonable expectation of privacy by reason of his search condition. We express no opinion on the issues to be decided by the trial court following remand.

3. *There Was Sufficient Evidence That Appellant Committed Burglary.*

Appellant concedes the house of Harding and Price was burglarized, appellant possessed stolen property, and there was evidence that it was recently stolen. There is no dispute that appellant possessed the recently stolen property of Harding and Price. Appellant claims only there was insufficient identification evidence.

In *People v. Banks* (1976) 62 Cal.App.3d 38, the defendant contended on appeal that there was insufficient evidence to support his conviction for burglary. (*People v. Banks, supra*, 62 Cal.App.3d at pp. 40, 42.) The appellate court stated, "'"In a prosecution for burglary the evidence on which a defendant is convicted may be purely circumstantial and if substantial, as in the present case, is sufficient to support the judgment of guilty."' [Citation.] The instant case falls within the rule that '[p]ossession of recently stolen property is so incriminating that to warrant conviction there need only

be, in addition to possession, *slight* corroboration in the form of statements or conduct of the defendant tending to show his guilt. [Citations.]' (*People v. McFarland* (1962) 58 Cal.2d 748, 754 . . . .)" (*People v. Banks, supra*, 62 Cal.App.3d at p.42, italics added.)

Here, there was substantial evidence that, a few hours after the home of Harding and Price was burglarized, and a few blocks from their home, appellant was found in conscious possession of the recently stolen property of Harding and Price. Smyth later saw appellant, taking a black case, enter a house under construction and go to its top floor. When Smyth and a uniformed officer told appellant, who was upstairs, to come down, he complied but left the black case upstairs. In short, there was substantial evidence that once appellant saw police, he left the stolen black case upstairs to hide it.

The fact that there may have been an alternative explanation for appellant's conduct in leaving the black case upstairs does not compel rejection of the inference that that conduct was motivated by consciousness of guilt of burglary. Any alternative explanations simply went to the weight of the evidence, and it was the jury's function to determine which of any several possible reasons actually explained appellant's conduct. (Cf. *People v. Perry* (1972) 7 Cal.3d 756, 772-774; *People v. Rhodes* (1989) 209 Cal.App.3d 1471, 1477.)

Moreover, appellant possessed a screwdriver, Saldana testified that a screwdriver was frequently used as a burglary tool to enter a residence, and the jury reasonably could have concluded that the burglar entered Harding's residence after prying open its front window. The jury reasonably could have concluded that appellant, through his aunt, presented false evidence concerning where he went after he allegedly left her house. There was sufficient evidence that appellant committed burglary, including sufficient identification evidence. (Cf. *People v. McFarland, supra*, 58 Cal.2d at pp. 754-755, 758; *People v. Banks, supra*, 62 Cal.App.3d at p. 42.) None of the cases cited by appellant compels a contrary conclusion.

4. *Remand for Resentencing Is Required Because the Trial Court Erroneously Believed That Its Imposition of Consecutive Sentences Was Mandatory.*

a. *Pertinent Facts.*

The clerk's transcript reflects that appellant was convicted of attempted burglary in case number SA044189, and placed on probation. The clerk's transcript also reflects that, on April 3, 2003, following a probation revocation hearing in case number SA044189, appellant was found in violation of probation and sentenced to prison for two years.

In the present case, on April 9, 2003, a mistrial was declared as to the charge that appellant committed burglary (count one), and a charge of receiving stolen property (count two) was dismissed. Following a retrial in the present case on the burglary charge, appellant was convicted.

At sentencing on October 2, 2003, the court, noting appellant had been found in violation of probation in case number SA044189, asked appellant if the court was "required to impose a consecutive sentence in light of the Three Strikes law[.]" Appellant replied in the negative; the prosecutor urged consecutive sentencing was mandatory.

The court sentenced appellant to prison for 12 years for the burglary (the 6-year upper term, doubled pursuant to the Three Strikes law), plus 5 years for the Penal Code section 667, subdivision (a), enhancement. The court modified the previously imposed two-year sentence in case No. SA044189, by staying all but eight months of that sentence. The court then stated, "The court directs the sentence in . . . case [No. SA044189] to be served consecutive to the sentence imposed in [the present case], and that is based on the court's view that is required by law."

b. *Analysis.*

As respondent concedes, remand for resentencing is required because the trial court erroneously believed that its imposition of consecutive sentences for the present case, and the probation case (case number SA044189), was mandatory under the Three Strikes law. The court erred because those two cases did not constitute "a *current*

conviction for *more than one* felony count" within the meaning of Penal Code section 667, subdivisions (c)(6) and (7). The present burglary conviction was the *sole* "current conviction." (*People v. Rosbury* (1997) 15 Cal.4th 206, 208-211.) We express no opinion concerning whether, in the exercise of its discretion, the sentencing court should impose concurrent or consecutive sentences for the two cases.[1]

DISPOSITION

The judgment is affirmed, except that the trial court's order denying appellant's Penal Code section 1538.5 suppression motion is reversed, appellant's sentence is vacated, and the matter is remanded to the trial court with directions to conduct a new hearing on the suppression motion previously filed by appellant. If the motion is granted, the court shall order the judgment vacated and set the matter for a new trial. If the motion is denied, the court shall resentence appellant consistent with this opinion.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

KITCHING, J.

We concur:

KLEIN, P. J.

ALDRICH, J.

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[1] Appellant claims that imposition of the upper term for his present burglary conviction violates *Blakely v. Washington* (2004) 542 U.S. ___, 159 L.Ed. 2d 403. Given the resolution of appellant's Fourth Amendment claim in part 2, of our Discussion, *ante*, and the fact that we are vacating appellant's sentence and remanding for resentencing for the reasons discussed in part 4, *ante*, we need not reach the *Blakely* claim.